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Convention on the Rights of the Child

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Committee on the Rights of the Child

Consideration of reports submitted by States parties under article 8 (1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

Reports of States parties due in 2012

Malawi*

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1. Introduction

1.1 The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OPAC) entered into force on 12 February, 2002 and Malawi signed the OPAC on 7th September, 2000 and ratified the same on 21st September, 2010. This is the Initial Report of Malawi to the CRC Committee on the OPAC.

1.2 Malawi has not been involved in armed conflict within itself or with her neighbours since it attained political independence in 1964. As such, on the face of it, it appears that the provisions of the OPAC are irrelevant. However, Malawi has since independence and previously maintained a standing army which has been involved in armed conflicts. During the same period, Malawi had a paramilitary group called the Malawi Young Pioneers who recruited and operated within Malawi. The Young Pioneers were established by statute, the Young Pioneers Act.[1] The Act was mainly aimed at providing for the organization, training and discipline of Young Pioneers. According to the Act, the Minister responsible for the Young Pioneers could, from time to time, order the employment of Young Pioneers in support of security forces for purposes of the preservation of law and order and public security.[2] The Young Pioneers Act was silent on the age at which a Young Pioneer would be recruited into service.

1.3 Malawi has also committed itself to a number of humanitarian instruments which regulate the rules of armed conflict for which she needs to account. Until 1992, one of Malawi's neighbours, Mozambique, was involved in a protracted civil war which led to spillage of refugees into the country for a long time.

1.4 Government, in developing this Report, consulted relevant public institutions, civil society organizations and international bodies present and working in Malawi. These institutions include the Defence Force; Ministry of Defence and National Security; the Ministry of Gender, Children and Social Welfare; the Ministry of Finance; the Ministry of Economic Planning and Development; the Ministry of Education, Science and Technology; the Ministry of Foreign Affairs; the Ministry of Home Affairs; the Ministry of Justice and Constitutional Affairs; Plan International (Malawi); Save the Children (Malawi); Police; the Judiciary; UNHCR; and the Malawi Red Cross Society. Government used questionnaires, Consultative Workshops and Key Informant Interviews to obtain relevant information regarding the Protocol. The findings from the consultative process were subjected to public scrutiny at another Workshop where participants vetted the contents of the Report.

2. General measures of implementation

2.1 Malawi ratified the Protocol without any reservations. In accordance with section 211 of the Constitution, any international agreement entered into after the commencement of the Constitution forms part of the law of the Republic if it is so provided by statute. International agreements that bound the State before the commencement of the Constitution continue to bind the State unless a statute provides otherwise. The Protocol is therefore applicable as law in Malawi to the extent of that legislation, stand alone or integrated, provides for measures under it. It must be noted, however, that the Constitution, in section 11 on Interpretation provides that courts shall, where applicable, have regard to current norms of public international law in interpreting the provisions of the Constitution.

[1] Cap. 13:03. This statute was repealed.

[2] See section 7.

2.2 The Constitution of Malawi came into effect in 1994 and, contrary to its immediate predecessor, introduced a comprehensive Bill of Rights. One of the basic constitutional principles provides that the inherent dignity and worth of each Malawian requires the State and all persons to recognize and protect human rights and to afford the fullest protection to the rights and views of all individuals, groups and minorities.

2.3 The Constitution establishes the Defence Force of Malawi as the only military force constituted in Malawi which is regulated in accordance with the Constitution and statute. The statute in question is the Defence Force Act which was enacted on 1st September, 2004. The Constitution, in providing for children under section 23, defines children as persons under the age of 16 years. The children are entitled to equal treatment before the law and their best interests and welfare are a primary consideration in all decisions affecting the children. The Constitution protects children from economic exploitation or any treatment, work or punishment that is or is likely to be hazardous, interfere with their education or is harmful to their health or to their physical, mental, spiritual or social development.

2.4 The Defence Force Act, among other things, provides for the establishment, administration, recruitment, conditions of service, training, command and discipline of the Defence Force of Malawi. The Defence Force Act has provided for enlistment and a Recruiting Officer shall not enlist a person under the age of 18 years or above the age of 24 years.

2.5 Since attaining independence in 1964 from Great Britain, Malawi has never engaged in an armed conflict within itself or with any other State. There have been no instances of children recruited and used in hostilities by armed groups, or in disarmament, demobilization and reintegration programmes. There have also been no recorded instances of children charged with war crimes.

2.6 However, it remains clear that in light of the creation of the Defence Force which recruits membership from among Malawians, there is a possibility of recruitment of persons who are protected under section 23 of the Constitution. Armed conflict falls within the ambit of hazardous circumstances likely to interfere with a child's development and welfare. It must be noted that birth registration has not been fully rolled out in Malawi and that, in many instances, age estimation suffices for purposes of determining age. This creates an opportunity of a person to enroll or be enrolled while below the age of 18 years.

2.7 Armed conflict is also an opportunity for the participants, including children if so recruited, to commit crime including war crimes, crimes against humanity, genocide and aggression. This opportunity places children at the disposal of punishment that violates section 23 of the Constitution both at international level and domestic level. Currently, owing to an amendment of 2010, the Penal code has elevated the age of criminal responsibility from 7 years to 10 years. However, a person under the age of 14 years is not criminally responsible for a crime unless it is proved that at the time of committing the crime, the person had capacity to know that he ought not to do the act or make the omission. Further, a person under the age of 14 years is presumed to be incapable of having carnal knowledge.

2.8 On 21 September, 2010 Malawi entered a binding declaration under Article 3 of the Protocol. Under the binding declaration, Malawi has indicated that the minimum age for recruitment for employment in the Defence Force of Malawi is 18 years, courtesy of section 19 (2) of the Defence Force Act. Government has made it a requirement that recruitment into the Defence Force is genuinely voluntary and is carried out with the informed consent of each person's parents or legal guardians. All persons interested to join the Defence Force of Malawi are fully informed of the duties involved in such military service and are required to provide reliable proof of age prior to acceptance into national military service.

2.9 Since the Constitution establishes the Defence Force as the only military force in Malawi, the Defence Force is the primary institution responsible for the implementation of the Protocol. However, in accordance with the Constitution, the Defence Force operates at all times under the direction of civil authorities vested with such powers. The ultimate authority for the Defence Force vests in the President as commander in Chief. The President appoints a Commander of the Defence Force who is responsible for the day to day management of the Defence Force and is accountable to the Minister responsible for Defence in whom vests the political responsibility for the Defence Force.

2.10 The Constitution also directs the establishment of a Defence Council by statute which includes the Minister for Defence and the Commander of the Defence Force. The Defence Council has been given powers to recommend to the President with respect to determination of the operational use of the Defence Force and appointment and removal from office of senior and other members of the Defence Force. The powers of the Defence Council are subject to scrutiny of the Defence and Security Council of the National Assembly which is itself established by the Constitution.

2.11 With respect to legislation, there is no specific legislation at domestic level drafted purposely with a specific aim of protection of children from involvement in armed conflict. The measures provided for under the Protocol are reflected under the Constitution, the Defence Force Act and the Child Care, Protection and Justice Act.

2.12 This Initial Report will be made available to the public together with information on the CRC. The Ministry responsible for children shall disseminate this Report to relevant Government Departments, Civil Society Organizations and International Bodies working in the areas affected by the Protocol.

2.13 With respect to the promotion and protection of the rights of the child, statute has established the Human Rights Commission (HRC). The Human Rights Commission Act of 1998 provides, in section 11, that all authorities including all organs of Government, shall recognize the status of the HRC as a national institution independent of the authority or direction of any other body or person. The mandate of the HRC is very broad and according to statute, the HRC is competent "in every respect to protect and promote human rights in Malawi in the broadest sense possible and to investigate violations of human rights on its own motion or upon complaints received from any person, class of persons or body".[3]

2.14 The HRC has a directorate of Child Rights which was previously a Unit. This elevation has enabled the Child Rights Directorate to comprehensively protect and fulfil the rights of the child in Malawi.

2.15 The MDF posits that the implementation of the Protocol has not been a challenge especially aided by the fact that there have not been hostilities within the territory of Malawi since independence. And, although, there has been no established birth registration system in place in Malawi for purposes of verifying age, there are a number of factors that assist in assessing the suitability of every applicant for recruitment into the MDF. Applicants are expected on application for recruitment to show some proof of age. In making the application, the applicant is expected to undertake that the details which he or she submits to the MDF are true. If anything is submitted which is known to be false, it will form the basis of discharge from the service.

[3] Section 12, Human Rights Commission Act (Cap. 3:08).

2.16 The MDF has not been instrumental in disseminating the Protocol both to its members and the public at large. However, the MDF is fully aware of the obligations it has under various international instruments and will, at all times, comply with Malawi's local and international obligations.

3. Prevention

Direct participation in hostilities (Article 1)

3.1 The Defence Force Act provides for enlistment of recruits. The recruiting officer cannot recruit a person below the age of 18 years, the minimum age for enlistment. The provision in question, section 19 (2), does not enable the age of enlistment to be lowered, even in exceptional circumstances. Although the provision is on account of pensions, gratuities and other benefits, regulation 73[4] provides for a requirement for submission of proof of date of birth. The regulation further provides that the proof under the regulation shall be to the satisfaction of the Minister.

3.2 While there are challenges with verification of age hitherto, Government championed the enactment of the National Registration Act in 2009 which provides for compulsory registration of all persons above the age of 16 years. The national identification records shall be used to verify the age of enlistees prior to acceptance in the military service.

3.3 The Defence Force act provides for the establishment of the Militia which shall consist of citizens of Malawi aged between 18 and 60 years who volunteer for service and are accepted by the commanding and discipline officer of the unit of the Defence Force in which they wish to serve.

3.4 Persons enlisted in the Defence Force are afterwards of enlistment required to undergo medical examinations and physical proficiency tests to assess their level of health and fitness, which are factors in determining the eligibility to serve.

Forced or compulsory recruitment (Article 2)

3.5 All recruitment into the Defence Force is carried out with the informed consent of each person's parents or legal guardians. The Defence Force Act does not under any circumstances provide for compulsory enlistment. There are no incentives for voluntary enlistment as this is the only form of enlistment.

3.6 The Defence Force does not operate vocational schools except for the Army Secondary School which provides for education for children of officers within the military. All persons enlisted for service first report as recruits for basic military training after which they may be posted for further training.

Non-governmental actors (Article 4)

3.7 By virtue of the Constitution, there are no armed groups operating in Malawi. Section 159 of the Constitution establishes the Defence Force of Malawi as the only military force constituted in Malawi.

[4] Defence Force (Regular Force) (Other Ranks) Regulations.

3.8 Malawi is a party to the four Geneva Conventions of 1949 and has enacted the Geneva Conventions Act (Cap. 12:03) in order to give effect to the Geneva Conventions of 12th August, 1949. The Geneva Convention (IV) relating to the Protection of Civilian Persons in Time of War contains provisions for the protection of children in armed conflict. The Defence Force complies with the principle to prevent attacks on civilian objects, including places that generally have a significant presence of children such as schools and hospitals.

3.9 Section 4(1) of the Geneva Conventions Act provides for the establishment of extraterritorial jurisdiction over grave breaches of international humanitarian law under the four Geneva Conventions of 1949 that Malawi is party to. Malawi may exercise her jurisdiction over child recruitment as a war crime as it constitutes a grave breach under Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Under Article 147 of the said Convention, "compelling a protected person to serve in the forces of a hostile power" amounts to a grave breach of the said Convention. This provision applies to both adults and children alike. Pursuant to the Geneva Conventions Act, the relevant provisions are enforceable against persons subject to military law where the offence or part of the offence is alleged to have been committed outside Malawi territory.

3.10 Malawi remains committed to eradicating child labour and has ratified two International Labour Organization (ILO) Conventions (Nos. 138 and 182). Under local legislation, the Employment Act (Cap. 55:01) prohibits child labour and punishes any persons contravening section 21 with a fine of K20,000 and to imprisonment for 5 years.

3.11 A request for extradition by another State Party to the OPAC would be considered under the domestic extradition regime. This regime permits extradition for the offences listed in the First Schedule of the Extradition Act (Cap. 8:03) to a Commonwealth country, or to a country with which Malawi has an extradition treaty. Malawi is also able to provide mutual legal assistance in respect of criminal matters in accordance with the provisions of the Mutual Assistance in Criminal Matters Act (Cap. 8:04) and any applicable Mutual Legal Assistance Treaty to which Malawi is a party.

National Implementation (Article 6)

3.12 Government has not undertaken any effort to announce the signing or ratification of the OPAC. However, in line with the provisions of the Defence Force Act and the binding declaration that has been deposited already, it is clear that Malawi is on course to undertake national implementation of the Protocol.

3.13 The law does protect the establishment and operation of the military. Prior to 1993, Malawi had a paramilitary wing of the then ruling party styled the Malawi Young Pioneers. This paramilitary wing was established under statute, the Young Pioneers Act. Since then, and in light of the 2004 Defence Forces Act, the Defence Force is the only military body operating in Malawi.

3.14 Government, starting with this reporting process, intends to disseminate this report and the Combined Third, Fourth and Fifth Report to all stakeholders on matters of children. Government has also embarked on a wide consultative process with public institutions, international institutions and civil society organizations.

4. Prohibition and related matters

4.1 Malawi does not have domestic legislation and regulations covering the acts enumerated in Articles 1 and 2 of the OPAC.

4.2 While the Defence Force Act requires the recruitment officer to only enlist persons above the age of 18 years, there are no offences prohibiting the recruitment officer nor the recruit from enlisting where the recruit is below the age of 18 years.

4.3 The Defence Force Act is also silent on the consequences of allowing persons who have not attained the age of 18 years to take a direct part in hostilities and being compulsorily recruited into the Defence Force.

5. Protection, recovery and reintegration

National Implementation (Article 6)

5.1 With respect to Article 6(3) of the OPAC on the physical and psychological recovery and social reintegration of child victims of armed conflicts, Malawi has not been involved in any armed conflict since it attained independence in 1964. In the event that there are any incidents of children who are victims of armed conflicts, torture, neglect, maltreatment or exploitation, the child protection system and provisions for protecting children shall be extended to such victims. The Constitution provides for protection to all children regardless of the circumstances of their birth and to all children in situations of disadvantage and entitles them to live in safety and security and, where appropriate, to State assistance.

5.2 The Child Care, Protection and Justice Act (CCPJA) (Act. No. 22 of 2010) is the key legislation providing for care and protection of children. The protection under statute also extends to all children indiscriminately. Malawi's child protection system is built on strong legislative protection against abuse and neglect and management of cases of abuse, training and education of community partners. The Ministry of Gender, Children and Social Welfare (MGCSW) is the lead Government department on child protection and works closely with other Government agencies and Non-Government Organizations (NGOs) to ensure timely interventions, services and programmes for children who may be victims of exploitation or abuse.

5.3 The CCPJA also provides for a system for providing support to vulnerable child witnesses who are required to give their evidence in criminal cases in court. A child has been defined under the CCPJA as a person who is below the age of 16 years of age.

5.4 Measures taken by Malawi to ensure that the child's identity is protected in accordance with Article 16 of the Convention on the Rights of the Child have been set out under section 139 of the CCPJA.Professionals such as social workers, psychologists and medical workers working with children safeguard the privacy of their clients as part of ethical practice and codes of conduct. The law protects the identity of a child who is undergoing court proceedings from being broadcasted or published to maintain the child's privacy and prevent media exposure and stigmatization of victims. Under section 139 of the CCPJA, the publication or broadcasting of information relating to court proceedings that may lead to the identification of the child or young person concerned in the proceedings is prohibited. In addition, section 139of the CCPJAalso prohibits the publication or broadcast of information that leads to the investigation of any child or young person who is subject to an investigation under the Act.

6. International assistance and cooperation

International Cooperation and Assistance (Article 7)

6.1 Malawi fully supports international efforts to end armed conflict and remains committed to protecting children from all forms of exploitation. Malawi also works with several international partners, such as UNICEF, Plan International and Save the Children in various areas on joint training programmes and conferences to promote the development and protection of children. Apart from its international commitments, Malawi is also involved in the work of regional organizations such as African Union and is party to the African Charter on the Rights and Welfare of the Child.

6.2 In the context of arms exports, Malawi takes our obligations to impose UN sanctions adopted by UN Security Council Resolutions very seriously. While there is no national legislation that specifically prohibits the trade and export of small and light arms as well as military assistance to countries where children may be involved in armed conflict, Government has been reviewing the Firearms Act (Cap. 14:08) in order to introduce measures that allow prohibitions to be put in place for ensuring compliance with UN Security Council Resolutions.

6.3 Malawi has actively participated in peace-keeping mission under the auspices of the United Nations and the African Union. There have never been incidents involving the MDF regarding a violation of any of the provisions of the Protocol.

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Item 4 of the provisional agenda
Consideration of reports of States parties

List of issues in relation to the report submitted by Malawi under article 8 (1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

The State party is requested to submit in writing additional, updated information (10,700 words maximum), if possible before 15 October 2016.

The Committee may take up any aspect of children's rights set out in the Optional Protocol during the dialogue with the State party.

1. Please provide information on any steps taken to pass legislation that would introduce the Optional Protocol into the domestic legislation of Malawi. Please also inform the Committee if the Optional Protocol has been invoked before the courts.

2. Please clarify which body is responsible for the implementation of the Optional Protocol and the coordination of activities related to the implementation.

3. Please provide information on any measures taken by the State Party to disseminate the Optional Protocol and implement awareness-raising programmes. Please also provide information on training activities related to the Optional Protocol for children and professionals working for and with children, especially for members of the peacekeeping and armed forces, the police, immigration officials and judges.

4. Please provide the data available on the number of child victims of offences under the Optional Protocol among refugee and asylum-seeking children living within the jurisdiction of the State party.

5. In view of reports that the number of children in possession of a birth certificate is very low and that the Defence Force Act does not require any proof of age, please explain what safeguards and practical measures are in place to prevent children from joining the armed forces before the age of 18.

6. Please indicate whether any measures have been taken to explicitly criminalize the enrolment and use of children in the armed forces. Please inform the Committee on any

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measures taken to establish the responsibility and accountability of recruitment officers for the recruitment and the use of children under 18 years old.

7. Please indicate the minimum age requirement for enrolment into the Army Secondary School, the number of children enrolled in the school, the proportion of academic and military training in the curriculum and whether the students enrolled in the schools are trained in the use of firearms.

8. Please indicate whether any measures have been taken to prevent children under the age of 18 from taking part in hostilities. Please also indicate what steps have been taken to prevent the recruitment of children by local chiefs to protect land.

9. Please explain whether there is extraterritorial jurisdiction and the possibility for extradition for crimes covered under the Optional Protocol and, if so, under which specific legislation.

10. Please inform the Committee what legislative and practical measures have been taken to prohibit expressly the acquisition and use of firearms by children. Please also explain what steps have been taken to regulate the use of home-made firearms.